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October 26, 2020

The Honorable Eugene Scalia  
Secretary of Labor  
U.S. Department of Labor  
200 Constitution Avenue, N.W.  
Washington, DC 20210

**Re: Comments on Notice of Proposed Rulemaking, RIN 1235-AA34 Independent Contractor Status Under the Fair Labor Standards Act**

Dear Secretary Scalia:

As a member of Congress, I write to urge the U.S. Department of Labor (the Department) to withdraw its harmful proposed rule to narrow the interpretation of employee status under the Fair Labor Standards Act of 1938.<sup>1</sup>

The Fair Labor Standards Act (FLSA), which sets minimum wage, overtime, and child labor standards, has a broad employment standard that ensures its protections extend to a wide range of workers. Congress established a broad definition of “employ” to include “to suffer or permit to work.”<sup>2</sup> By using this definition, Congress rejected the very narrow common law standard of employment. In fact, employment under the FLSA’s “to suffer or permit to work” standard is the “broadest definition that has ever been included in any one act.”<sup>3</sup> For decades, the courts have carried out congressional intent to define employment status broadly by applying a multi-factor economic realities test to help determine whether a worker is economically dependent on the potential employer or is in business for him or herself.<sup>4</sup> While different courts use a variation of factors, the ultimate question is on the extent of economic dependence.

The Department has routinely used this broad definition for determining employee status. As recently as 2019 in an opinion letter, the Department stated, “When determining economic

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<sup>1</sup> Independent Contractor Status Under the Fair Labor Standards Act, 85 Fed. Reg. 60600 (No. 187) (Proposed September 25, 2020).

<sup>2</sup> 29 U.S.C. 203(g).

<sup>3</sup> *United States v. Rosenwasser*, 323 U.S. 360, 363 (1945) (quoting 81 Cong. Rec. 7,657 (1938) remarks of Sen. Hugo Black).

<sup>4</sup> *Tony & Susan Alamo Found. v. Sec’y of Labor*, 471 U.S. 290, 301 (1985) (the test of employment under the FLSA is economic reality); *Goldberg v. Whitaker House Co-op, Inc.*, 366 U.S. 28, 33 (1961).

dependence, WHD considers six factors derived from Supreme Court precedent.”<sup>5</sup> These factors are a combination of the multi-factor economic realities test under *United States v. Silk*, 331 U.S. 704 (1947) and *Rutherford Food Corp v. McComb*, 331 U.S. 722, 728 (1947), which the courts have used for decades.

The Department’s proposal to narrow its interpretation of employee status directly conflicts with the text of the FLSA and congressional intent by creating a new five-factor test that centers around a degree of control and places unprecedented weight on two factors.<sup>6</sup> With the passage of the FLSA, Congress intended “to eliminate, as rapidly as practicable, substandard labor conditions throughout the nation.”<sup>7</sup> The Department is undermining congressional intent with the proposed narrow control test; a proposal that could leave out a significant portion of our workforce, including gig workers.

According to the Department’s data, about 19 million people in the United States are classified as independent contractors. Using the Department’s estimate, this represents at least 12 percent of our workforce. However, the Department also acknowledged that this figure is likely an underestimate as it does not include workers that are classified as independent contractors in secondary jobs.<sup>8</sup> As such, the Department does not have complete data on the number of workers currently in the gig economy.

Misclassification is most prevalent in industries such as the gig economy where employers have a greater financial incentive to shift costs onto workers. Gig workers are routinely misclassified as independent contractors which has allowed companies to evade providing these workers with the basic minimum wage and overtime protections guaranteed under the FLSA. Misclassification allows employers to avoid paying the appropriate amount of employment taxes owed to the U.S. government. It is also prevalent in industries in which employers have a greater ability to conceal misclassification practices or employer responsibility is more difficult to determine.<sup>9</sup> As such, the employment status of gig workers that are drivers at app based transportation network companies such as Uber and Lyft have been litigated in states across the country, with the courts ruling in favor of workers.<sup>10</sup> Unfortunately, the Department’s flawed proposal on employee status would only exacerbate the problem of misclassification in this industry.

The Department’s proposal also fails to include an estimate of the number of workers who could be misclassified as independent contractors as a result of its proposal or address the proposed rule’s impact on the current gig worker industry which already experiences rampant misclassification. Additionally, the Department fails to estimate how much workers would lose in wages under its proposal.

According to the Economic Policy Institute, if finalized, this proposal will result in at least \$3.7 billion in wage transfers from workers to employers as well as additional expenses incurred by

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<sup>5</sup> [https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/2019\\_04\\_29\\_06\\_FLSA.pdf](https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/2019_04_29_06_FLSA.pdf)

<sup>6</sup> 85 Fed. Reg. 60610 (No. 187) (Proposed September 25, 2020).

<sup>7</sup> *Powell v. United States Cartridge Co.*, 339 U.S. 497, 510-11.

<sup>8</sup> 85 Fed. Reg. 60623, 60624 (No. 187) (Proposed September 25, 2020).

<sup>9</sup> Françoise Carré. “(In)dependent Contractor Misclassification.” Economic Policy Institute (June 2015), <http://www.epi.org/publication/independent-contractor-misclassification/>

<sup>10</sup> Ibid.

workers each year.<sup>11</sup> Gig workers routinely struggle with low wages and economic insecurity. For example, in California and New York, on average most gig drivers receive significantly less than the state's minimum wage.<sup>12</sup> If classified as employees, these workers would see about a 30 percent increase in their compensation.<sup>13</sup> However, this proposed rule would only further disparate treatment for these workers.

I am disappointed by the Department's attempt to rush and approve a rule by the end of the year that would leave workers, including gig workers, worse off while also providing an inadequate opportunity for the public to weigh in on how the proposed rule would negatively impact workers. It is imperative that workers receive the necessary wage and hour protections afforded by the FLSA. These protections are critical to supporting the economic security of workers, their families, and our communities. Any effort to fast track a rule that would exclude workers from minimum wage and overtime protections, especially during a global pandemic, is unacceptable.

I strongly urge the Department to withdraw this harmful proposed rule.

Sincerely,



Mark Takano  
Member of Congress

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<sup>11</sup> Economic Policy Institute, Comment Letter on Proposed Rule on Independent Contractor Status Under the Fair Labor Standards Act (forthcoming Oct. 26, 2020).

<sup>12</sup> Michael Reich. "Pay, Passengers and Profits: Effects of Employee Status for California TNC Drivers." University of California, Berkeley (October 5, 2020), <https://irle.berkeley.edu/files/2020/10/Pay-Passengers-and-Profits.pdf>; See also: Lina Moe, et al. "The Magnitude of Low-Paid Gig and Independent Contract Work in New York State," The New School Center for New York City Affairs, (February 2020). [https://static1.squarespace.com/static/53ee4f0be4b015b9c3690d84/t/5e424affd767af4f34c0d9a9/1581402883035/February2020\\_GigReport.pdf](https://static1.squarespace.com/static/53ee4f0be4b015b9c3690d84/t/5e424affd767af4f34c0d9a9/1581402883035/February2020_GigReport.pdf)

<sup>13</sup> Michael Reich. "Pay, Passengers and Profits: Effects of Employee Status for California TNC Drivers." University of California, Berkeley (October 5, 2020), <https://irle.berkeley.edu/files/2020/10/Pay-Passengers-and-Profits.pdf>